

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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In re Applications of	)	MM Docket No. 90-638
	)	
HEIDI DAMSKY	)	File No. BPH-880816MW
	)	
WEDA, LTD.	)	File No. BPH-880816NR
	)	
HOMEWOOD PARTNERS, INC.	)	File No. BPH-880816NU
	)	
For a Construction Permit for a New	)	
FM Station on Channel 247A in	)	
Homewood, Alabama	)	
	)	
TO: The Full Commission		

**REPLY TO "OPPOSITION TO PETITION FOR FURTHER RECONSIDERATION"**

Heidi Damsky ("Damsky"), by her attorney hereby respectfully replies to the "Opposition to Petition for Further Reconsideration", filed in this proceeding by Homewood Radio Co., L.L.C. ("HRC"), on October 5, 1998. In reply thereto, it is alleged:

1. At the outset Damsky's Further Petition for Reconsideration is not an unauthorized pleading. It is specifically authorized by Section 405 of the Communications Act, 47 U.S.C. Section

405.<sup>1</sup> Damsky has filed this Further Petition to call attention to drastically changed circumstances, arising from the Commission's First Report and Order in Docket No. 97-234, released August 18, 1998, and published on September 11, 1998, at 63 FR 48615.

2. At paragraphs 80, et seq., of that First Report and Order, the Commission sets forth auction procedures for "frozen non-hearing cases", i.e., cases that were frozen because of the ruling of the Court of Appeals in Bechtal v. F.C.C., 10 F.3d 875 (D.C. Cir. 1993).<sup>2</sup> This case is one of the cases that were frozen. Thus, Damsky is one of the categories of applicants covered by paragraphs 80, et seq., of the First Report and Order, and she is entitled to participation in an auction.

3. HRC, of course, argues to the contrary, contending, in substance, that the Commission chose to unfreeze this case and give special treatment to Damsky's application, i.e., to deny the application solely for the purpose of accommodating the interest of Damsky's two competitors who chose unilaterally to enter into a settlement agreement from which Damsky was excluded. But that is exactly what Damsky is complaining about.

4. Her application was denied solely because she was held to be financially unqualified. It now turns out, however, that the Commission has decided to abolish the concept of financial qualifications and no longer apply that concept to applicants who participate in future proceedings.

5. Damsky could scarcely have anticipated this from the Commission's Notice of Proposed Rule Making, which led to the adoption of the First Report and Order. In the Matter of

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<sup>1</sup>Indeed, it is mandated by Section 405, which specifically prohibits review of an agency action based upon new developments, unless the agency is first given an opportunity to deal with the arguments which arise from the new circumstances.

<sup>2</sup>Public Notice, FCC Freezes Comparative Hearings, 9 FCC Rcd 1055 (1994).

Implementation of Section 309(j) of the Communications Act, FCC 97-397, 12 FCC Rcd 22363 (1997) (“NPRM”). Nowhere in that lengthy document is there any mention, whatsoever, of the term “financial qualifications”. Indeed, the Notice did not even establish conclusively that the Commission would apply its auction procedures to the old frozen cases. That was one of the matters to be considered along with the question of whether the Commission had any discretion to continue to use hearings for these old cases. 12 FCC Rcd 22363 at paras. 13-22.

6. Pointing out that the ALJ specified a character issue against Damsky, HRC argues that, if Damsky is the successful bidder at the auction, she will have to establish her character qualifications by a subsequent hearing. Damsky respectfully disagrees. It is true, as HRC argues, that there was a character issue, and counsel for Damsky apologizes if, through faulty recollection, he indicated otherwise. However, after a full hearing on the character issue, the Judge decided not to make any adverse findings against Damsky on the character issue. He wrote that:

“For all of these reasons, Damsky was financially unqualified at the time of certification. It is, therefore, unnecessary to reach the more subjective question of whether Ms. Damsky knowingly intended to deceive the Commission when she certified she was financially qualified. *Aspen FM, Inc.*, 5 FCC Rcd 3196, 3199 (Rev. Bd. 1990); *Janice Faye Surber*, 5 FCC Rcd 6155, 6159 (Rev. Bd. 1990).” (Footnotes omitted.) Heidi Damsky, 7 FCC Rcd 5244 at para. 183 (Initial Decision, 1992).

7. Thereafter, under date of September 18, 1992, Homewood Partners, Inc., filed a “Contingent Exceptions and Consolidated Supporting Brief of Homewood Partners, Inc.”, in which it excepted at paragraph 3 to the ALJ’s alleged error “in not addressing and resolving Ms. Damsky’s lack of candor/misrepresentation issue against her”. However, although the full Commission had these Exceptions before it when it issued its Memorandum Opinion and Order, released May 6,

1998, in this proceeding, the full Commission did not grant these Exceptions, but allowed the ALJ's order to stand, in which the ALJ found only that Damsky was financially unqualified and expressly declined to find that she lacked the basic qualifications to be a Commission licensee. Thus, this case is quite different from the case of Dorothy O. Schulze and Deborah Brigham, A General Partnership, 13 FCC Rcd 3259 (1998), cited at paragraph 13 of the Opposition. In Schulze, the Commission disapproved a settlement because the prevailing applicant had been expressly disqualified for misrepresentation and lying to the Commission. Here, after a full hearing, the ALJ declined to make any such findings against Damsky.

8. In its Opposition, HRC invokes the provisions of Section 309(j)(6)(E) of the Communications Act and argues that those provisions support the actions which the Commission has taken here. Actually, Section 309(j)(6)(E) does not support the special treatment that was given to the Damsky case as opposed to the other frozen hearing cases. Section 309(j)(6)(E) reads as follows:

"(6) Rules of Construction. - Nothing in this subsection, or in the use of competitive bidding, shall -

(E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings;"

Thus, the section requires the Commission to use engineering solutions, negotiation, service regulations and other means in order to avoid [auctions]. The section says nothing about arbitrary and capricious arrangements such as the one imposed by Damsky's opponents in this proceeding, in which two applicants unilaterally get together and settle proceedings and exclude a third party from any participation in any settlement by persuading the Commission to disqualify the third

applicant for violation of a threshold qualifications standard (financial qualifications), which the Commission has now determined no longer exists. Nor does the section support the proposition urged by HRC that Damsky can be treated any differently than the other applicants in frozen comparative cases, which are now entitled to participation in the forthcoming auctions. Many of these other applicants were doubtless denied for financial or site certifications reasons, but they will not be excluded for these reasons. To deny Damsky participation in the auction, while allowing these other applicants to participate, is to deny Damsky equal treatment with similarly affected applicants, in violation of well established principles of due process. Melody Music v. FCC, 345 F.2d 730 (D.C. Cir. 1965).

9. HRC argues that Damsky is not entitled to participate in the auction, because Damsky's application has been "finally" denied. That is a different tune than the song HRC was singing when it tried successfully to get the FCC to issue a construction permit to HRC, notwithstanding the existence of Damsky's administrative appeals and motion for stay on file. In a letter dated July 31, 1998, HRC's counsel wrote as follows:

"Finally, HRC has stated unequivocally that it is prepared to accept the risk of an adverse ruling by the Commission or a reviewing court and the Commission should condition the construction permit upon any subsequent adverse action that the Commission may take with respect to the pending pleadings filed by Damsky. In the situation of the closing of a sale of a station prior to finality, the Commission has held that the parties doing so bear the risk that the transaction might have to be undone because the Commission or a reviewing court might require the sale to be set aside. Improvement Leasing Co., 73 FCC 2d 676, 684, aff'd sub nom. Washington Ass'n for Television and Children v. F.C.C., 667 F.2d 1264 (D.C. Cir. 1984). The Commission has similarly conditioned construction permits for new stations issued prior to finality. Further, HRC would not seek any equities for itself from the Commission as a result of the construction and operation of the Station."

10. HRC's definition of "finality" is not only inconsistent with the position which it has taken in the past, but it is also inconsistent with the Commission's definition. In the First Report and Order, at paragraph 92, the Commission stated that:

"As a result of settlements executed during the 180-day waiver period, all of the frozen hearing cases are now pending before the Commission. Following release of this order, the General Counsel, acting on delegated authority, will issue an order in each case identifying the eligible, qualified bidders entitled to participate in the auction, referring all such cases to the Mass Media Bureau for processing in accordance with the auction procedures outlined above for the frozen *Bechtel* non-hearing cases, and either stay or terminate the hearing proceeding, depending on whether there are any unresolved hearing issues (including any unresolved petitions to enlarge issues) relating to the basic qualifications of any particular applicant. As proposed in the *Notice*, 12 FCC Rcd at 22376 (para. 30), the hearing proceeding will resume only in the event that such an applicant is the winning bidder."

11. Clearly, Damsky having preserved all of her administrative remedies, her case is "pending before the Commission". Clearly, also, Damsky is an "eligible, qualified bidder entitled to participate in the auction".

12. Only those applicants whose applications have been decided or dismissed and such denial or dismissal has become final (e.g., when an applicant failed to seek further administrative or judicial review of that ruling) are to be excluded from the auction. First Report and Order, paragraph 89. Damsky does not fall into that category of applicants, because she has continuously preserved her administrative remedies. It follows, therefore, that Damsky is entitled to participate in the Homewood auction.

13. For the reasons set forth above, Damsky respectfully submits that she does not face a basic qualifications issue; a full hearing was held on such an issue and the ALJ declined to

make findings adverse to Damsky's character qualifications. Furthermore, despite the filing of Exceptions requesting such adverse determinations, the full Commission declined to make any adverse findings. Furthermore, at paragraph 99 of the First Report and Order, the Commission makes it clear that even in cases involving basic character qualifications, the existence of such issues does not prohibit an applicant from bidding at the auction. If, following the auction of the successful bid, such an applicant is found to be disqualified, the Commission will simply award the construction permit to the next runner up bidder. First Report and Order at paragraph 100.

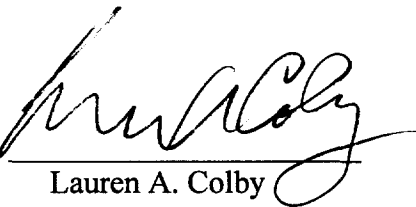
14. Here, the First Report and Order creates a right in Damsky to compete for the Homewood channel through a system of competitive bidding. Damsky claims that right.

Respectfully submitted,

October 15, 1998

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CERTIFICATE OF SERVICE

I, Traci Maust, a secretary in the law office of Lauren A. Colby, do hereby certify that copies of the foregoing have been sent via first class, U.S. mail, postage prepaid, this 15<sup>th</sup> day of October, 1998, to the offices of the following:

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